U.S. Department of Labor

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Issue Date: 19 March 2003

Case No.: 2002-LHC-00805

OWCP Nos: 2-120374

In the Matter of:

GUY P. BOISVERT
Claimant,

v.

RAMSTEIN AIR BASE, GERMANY
Employer,

and

AIR FORCE INSURANCE FUND
Carrier.

Appearances:
Mickale Carter, Esq., for the Claimant
Charles Brower, Esq., Air Force Services Agency, for the Respondents

Before:
DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §§ 901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-8173. Guy P. Boisvert ("Claimant") sought compensation from Ramstein Air Force Base and the Air Force Insurance Fund (collectively "Respondents") for an injury sustained in the course of his employment. A formal hearing was held on October 10, 2002, at Ramstein Air Force Base in Germany. Claimant offered exhibits CX 1 through CX 26; Respondents offered

exhibits RX 1 through RX 30.[1] The record remained open for the receipt of additional evidence. The parties agreed to stipulations on the record and both parties submitted post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Employer and Claimant stipulated to, and the court finds the following facts:

1. Claimant suffered an injury on August 14, 1998, while in the course and scope of his employment.

2. There existed an employer/employee relationship at the time of the accident/injury.

3. Claimant advised Respondents of the injury in writing on August 17, 1998.

4. Respondents did not file a Notice of Controversion.

5. No informal conference was held.

6. Claimant's average weekly wage at the time of injury was $426.80.

7. Respondents have paid Claimant benefits in the amount of $46, 843.36; Respondents stopped compensation payments on November 25, 2001.

8. Respondents have paid medical benefits in the amount of $6,780.23, according to the computer records of the Air Force Insurance Fund.

9. The date of maximum medical improvement ("MMI") was October 6, 1998.

JX 1.

10. It is Department of Defense ("DOD") policy to limit civilian employment in appropriated funds positions in foreign areas to five years, subject to the approval of extensions.

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[1]The following abbreviations will be used as citations to the record:
CX - Claimant's Exhibit
RX - Respondents' Exhibit
JX -Joint Exhibit
Tr. - Transcript of 10/10/02 hearing

11. 10 U.S.C. § 1784 governs military spouse preference and the Executive Order 12568, dated October 2, 1986, implemented the spousal preference; the DOD Instruction 1404.12, paragraphs 4.3 and 4.4 represent the DOD's implementation of the Executive Order and the statutory provisions for military spouse preference.

Tr. at 3-5.

PRELIMINARY ISSUES - OBJECTIONS TO POST-HEARING EXHIBITS

Respondents' Objections

On February 20, 2003, Respondents filed a Motion to Exclude Claimant's Post-Hearing Exhibits 24, 25, and 27-34. On February 24, 2003, Claimant filed his Opposition to Motion to Exclude Exhibits and Respondents filed a Reply on February 26, 2003. Initially, the court shall respond to Claimant's general response to Respondents' objections based upon the untimeliness of the submission of the post-hearing exhibits. Claimant contended that "the carrier cannot have its cake and eat it too," referring to the fact that if Claimant's exhibits are excluded as untimely, then Respondents' post-hearing deposition of Paul Johnson should be excluded, as it was also untimely. Claimant, however, is mistaken. The court noted at the hearing that the parties would be given sixty (60) days to take the deposition and an additional thirty (30) days to submit the deposition transcript to the court. The transcript of the deposition was ordered to be mailed to the court by Friday, December 13, 2002. *See* Tr. at 340. The deposition of Paul Johnson was taken on October 30, 2002; Respondent mailed the transcripts to the court on December 13, 2002. Accordingly, the Paul Johnson deposition was submitted to the court prior to the closing of the record on December 13, 2002, as ordered by the court.

By the same token, the court notes that excluding exhibits solely on the ground of untimely submission may not be appropriate in this case. The Federal Rules of Evidence and the rules of the court are relaxed in administrative hearings. An Administrative Law Judge has great discretion concerning the admission of evidence; it is largely within the court's discretion to admit or exclude post-hearing exhibits. As this case presents several issues of law and contested issues of facts, the court is willing to be flexible with filing deadlines in order to make every effort to ascertain the entire situation and apply the law accordingly. That being said, the court will now address each objection and exhibit in turn.

Exhibit 24. Exhibit 24 submitted post-hearing is a copy of page 1 of Mr. Glazer's surveillance report. The court notes that this exhibit is not the same as the CX 24 admitted at trial, which was the Curriculum Vitae ("CV") of Franz-Peter Holzer. Respondents objected to the admission of this exhibit on the ground that Claimant did not offer it at trial, nor did he offer it prior to December 13, 2002, the court-ordered date on which the record was to be closed. Claimant contended that this is the second page of RX 34, which was admitted at the hearing. Claimant is correct that this is page 2 of RX 34. Therefore, as RX 34 as already been admitted into the record, without objection, there is no need for it to re-appear as CX 24, especially as CX 24 is a duplicate number. Therefore, CX

24 will remain the CV of Mr. Holzer. The CX 24 which Claimant submitted post-hearing will be disregarded, as it is found at RX 34.

Exhibit 25.[2] This exhibit consists of the German weather reports that Claimant's counsel attempted to admit during the hearing. Respondents objected to the admission of this exhibit on the ground that Claimant did not properly move for its admission, nor tender it in any manner prior to December 13, 2002, the court-ordered date on which the record was to be closed. Moreover, Respondents noted that the hand-written notes in the margin on the exhibit are Claimant's counsel's translations of the German text. Thus, Respondents contended that this exhibit was not translated into English by a qualified German translator. The court sustains Respondents objection; CX 25 is not received into evidence. During the hearing, the court informed Claimant's counsel that she could submit the weather reports, upon proper motion, post-hearing with English translations. Tr. at 218. While the court may have been willing to overlook Claimant's counsel's failure to properly move the court to accept this document, as the court was aware that counsel intended to submit the weather report as an exhibit, the court does not consider Claimant's counsel's use of a German/English dictionary to translate isolated phrases of a weather report sufficient. In order to be considered viable, the exhibit, *in toto*, must be clearly understandable to all parties. As noted during the hearing, neither the court, nor Respondents' counsel, reads or understands the German language. It is therefore insufficient for Claimant to submit a partially translated document. Accordingly, Respondents' objection is sustained; CX 25 is not received into evidence. The court will rely only upon the credibility of the testimony of the parties concerning their personal observations and memories of the weather conditions on the day at issue.

Exhibit 26. Exhibit 26a and 26b are photographs of Claimant's residence. These were admitted at trial. There is no objection, therefore, they are received into evidence.

Exhibit 27. Exhibit 27 is the CV of Helen Puckey. Respondents objected to the admission of this exhibit on the ground that Claimant did not offer it prior to December 13, 2003, the court-ordered date on which the record was to be closed. Claimant contended that this document supports Claimant's objection to the court's refusal to allow Helen Puckey to testify. The court finds that this document is insufficient to establish Ms. Puckey as a medical or vocational expert. In fact, the CV supports the court's determination that Ms. Puckey is a physical therapist/physiotherapist. Therefore, the court reiterates its ruling that Ms. Puckey is not qualified as an expert and therefore may not testify as to medical or vocational issues. Accordingly, Exhibit 27 is irrelevant and Respondent's objection is sustained. Exhibit 27 is not received into evidence.

Exhibit 28. Exhibit 28 appears to be Claimant's Leave and Earnings Statement as of October 30, 2002, for his current Army NAF position.[3] Respondents objected to the admission of this exhibit

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[2]The court notes that this exhibit is not the same as the CX 25 admitted at trial. Three photographs of Mr. Brewington's office were admitted at the hearing as CX 25, however, those exhibits are included at RX 24-69. Therefore, the court will address CX 25 as the German weather report submitted post-hearing by Claimant.

[3]The court notes that this document is an illegible photocopy, therefore, its use in the court's analysis will be severely limited.

on the ground that Claimant did not offer it at trial, nor did he offer it prior to December 13, 2002, the court-ordered date on which the record closed. Claimant contended that this document evidences Claimant's current employment status, and as Claimant began this job after the hearing, the document only became available after the hearing. Although the exhibit's submission was untimely, the court overrules Respondents' motion. An important issue in this case is Claimant's ability to secure employment within his restrictions, as well as the documentation of any loss of wage earning capacity. Therefore, this document is relevant to the court's analysis and its relevancy is outweighed by any undue prejudice to Respondents caused by the delayed submission. Respondents' objection is overruled; CX 28 is received into evidence.

Exhibit 29. Exhibit 29 is Claimant's Leave and Earnings Statement for his Air Force NAF position as a Recreation Aid, Front Desk Employee at the Ramstein Bowling Center. Respondents objected to the admission of this exhibit on the ground that Claimant did not offer it at trial, nor did he offer it prior to December 13, 2002, the court-ordered date on which the record closed. Claimant contended that this document "should have been presented by the [Respondents] in the interest of justice to show the hourly rate at the bowling alley job." Claimant thus offered it as rebuttal to any argument that the Respondents may make that the Recreation Aid job paid more than $5.66 per hour. Although the exhibit's submission was untimely, the court overrules Respondents' motion. An important issue in this case is Claimant's ability to secure employment within his restrictions, as well as the documentation of any loss of wage earning capacity. Therefore, this document is relevant to the court's analysis and its relevancy is outweighed by any undue prejudice to Respondents caused by the delayed submission. Respondents' objection is overruled; CX 29 is received into evidence.

Exhibit 30. Exhibit 30 is a copy of the Air Force's Worker's Compensation Procedures. Respondents objected to the admission of this exhibit on the ground that Claimant did not offer it at trial, nor did he offer it prior to December 13, 2002, the court-ordered date on which the record closed. Claimant offered this exhibit in support of his request that the court take judicial notice of the Air Force Regulations. The court declines to take such judicial notice of the regulations, as they have no bearing on the issues in this case. The Air Force Regulations have no relevancy when analyzing disability compensation under the Act. Accordingly, EX 30 is irrelevant and Respondents' objection is sustained. EX 30 is not received into evidence.

Exhibits 31, 32, and 33. These exhibits were offered by Claimant as rebuttal exhibits to the deposition testimony of Paul Johnson. Respondents objected to the admission of these exhibits on the ground that Claimant did not offer it at trial, nor did he offer it prior to December 13, 2002, the court-ordered date on which the record closed. Claimant contended that these exhibits could not have been submitted prior to the court-ordered deadline, as they are rebuttal exhibits and Mr. Johnson's deposition was taken after December 13, 2002. The court again notes that Claimant is mistaken in his argument that Mr. Johnson's deposition was taken after the December 13, 2002, deadline, however, the court finds no undue prejudice to the Respondents in the inclusion of the documents to the record, despite their untimeliness. The court is fully capable of assessing the qualifications, procedures, and activities of the vocational expert and assigning the proper weight

accordingly. Therefore, Respondents' objection is overruled; CX 31, 32, and 33 are received into evidence.

Exhibit 34. Exhibit 34 is the decision of the EEOC claim made by Claimant. Respondents objected to the admission of this exhibit on the ground that Claimant did not offer it at trial, nor did he offer it prior to December 13, 2002, the court-ordered date on which the record closed. As this decision is dated January 30, 2002, Claimant contended that its prior submission to the court was not possible. While the court agrees that this exhibit was submitted to the court at the earliest possible time, the document itself is irrelevant to the instant case. A decision of the EEOC is not relevant under the Act. Accordingly, Exhibit 34 is irrelevant and Respondents' objection is sustained. Exhibit 34 is not received into evidence.

Exhibit 35. Exhibit 35 consists of the 25 exhibits attached to Claimant's LS-203 and the 17 exhibits attached to Claimant's LS-18. These exhibits were admitted at trial. There is no objection to their inclusion. Thus, despite Claimants failure to cull out the exhibits which duplicate exhibits filed by Respondents, it is received into evidence.

Exhibit 36. Exhibit 36 is the transcript of the post-trial deposition of Ms. Debra Glenn. Although the exhibit's submission was untimely, Respondents did not object to its admission. Thus, it is received into evidence.

In summation, the following post-hearing exhibits submitted by Claimant are accepted by the court, over Respondents' objection, and are received into evidence: CX 26, 28, 29, 31, 32, 33, and 35. Alternatively, the following post-hearing exhibits submitted by Claimant are not accepted; Respondents' objections are sustained and they are not received into evidence: CX 24, 25, 27, 30, and 34.

Claimant's Objections

Included in his post-hearing brief, Claimant objected to the inclusion on two post-hearing exhibits submitted by Respondents. First, Claimant objected to *Exhibit 36* and moved for disqualification of Respondents' expert witness Paul Johnson. Claimant contended that Mr. Johnson's education, training, and experience do not qualify him as an expert in either medical or vocational issues. The court agrees that Mr. Johnson is not an expert in the medical field, however, he is not called upon by either party to relay a medical diagnosis or opinion. The court disagrees that Mr. Johnson is not an expert in vocational training. To the contrary, Mr. Johnson's CV, submitted as RX 30, shows that he is in fact a vocational counselor and therefore, according to the Act, is qualified to administer vocational counseling, to prepare a labor market survey, and to testify as to vocational issues. Accordingly, Claimant's objection to this witness and motion for disqualification are overruled. The court will analyze Mr. Johnson's qualifications, deposition testimony, and labor market survey and afford them the appropriate weight in rendering its conclusions of law. Therefore, RX 36 is received into evidence.

Next, Claimant objected to Respondents' post-hearing *Exhibit 37*, the Declaration of Debbie Kelley. Claimant contended that this exhibit should be excluded because Ms. Kelley "refused to make herself available for a deposition," therefore, Claimant argued that he had no opportunity to cross-examine her. Claimant further contended that this declaration is self-serving, inadmissible hearsay, and "filled with irrelevant information, which is more prejudicial than probative." The court disagrees with Claimant's contentions, and therefore, overrules this objection. There is no evidence that Claimant was denied any request to speak with Ms. Kelley. Claimant never filed a motion to compel the deposition testimony or answers to interrogatories by Ms. Kelley. Moreover, the court finds there is no prejudice to the Claimant in Ms. Kelley's statement. In fact, the document seems to corroborate and confirm Claimant's contention that he is currently employed in a NAF position with the Army which is within his medical restrictions. The court is perplexed by Claimant's insistence that this document is prejudicial, as it appears to support his argument as evidence of a current wage-earning capacity. Accordingly, Claimant's objection to this exhibit is overruled and RX 37 is received into evidence.

With these preliminary issues concerning post-hearing exhibits resolved, the court now turns to the substantive issues in this case.

ISSUE

Whether Claimant is entitled to any further disability compensation under the Act.

FINDINGS OF FACT

Right Shoulder Injury and Medical Evidence

While in the military, Claimant injured his right shoulder. He then re-injured it while working as the Maintenance Control Clerk at the Ramstein Enlisted Club. Tr. at 51. He described the incident which lead to his injury as follows:

> I picked up the air conditioner and the weight of the air conditioner was probably around 200 pounds. The strength, I could pick it up, but my bone structure could not handle my muscles. My arm literally exploded out the back and dislocated.

Tr. at 51. Claimant described his injury as a posterior dislocation. Tr. at 52. Dr. Hager performed surgery on his shoulder. Claimant described the surgery as a procedure in which a bone chip was removed from his hip and placed through his shoulder under the back of the scapula in order to reverse the dislocation and stabilize the shoulder. *Id.*

After the surgery, Claimant was placed on worker's compensation. Tr. at 52. He returned to work in May 1997, several months after the surgery. Tr. at 53. He then worked until August 1998. *Id.* He continued to work successfully, obtaining several favorable evaluations. *Id.*

In August 1998, Claimant again re-injured his right shoulder. He described the incident as follows:

> We were setting up the Rene Walker Bank and they needed to have power so I was getting the wire ready and stripping for a cannon plug, which is a 3-phase plug that has extremely large gage wire. As I stripped it, the first or second wire, with that fast action was when my arm went out.

Tr. at 53. Claimant testified that this incident

> tore the bone off the scapula. Because of the force that I used, my arm exploded. It went dead. Then felt like tingling. Then it went numb. Then it starting coming back and would go dead again. It just kinda hung there for the rest of the day.

Tr. at 54.

Claimant was treated by Dr. Kelemen, a German doctor who worked with the surgeon, Dr. Hager, who operated on Claimant. Dr. Kelemen concluded that there was "restriction of movement in the right shoulder which will exist permanently, a minimum of 20%." RX 5. On November 6, 1998, Dr. Kelemen wrote:

> The patient has reached maximum medical improvement. In addition to a minimum of 20% restriction in movement, the patient will continue to experience discomfort in his arm, middle back, neck and, lower back . . . there is no treatment other than pain relievers and muscle relaxers. . .
>
> The patient will never be able to perform activities over his head. He also will never be able to lift weight over 10 kilograms.

RX 5. Claimant was given Motrin and a sling to stabilize his arm. Tr. at 54. Subsequently, Dr. Kelemen reiterated Claimant's medical condition and restrictions repeatedly. *See* RX 5; CX 2-4.

Claimant testified that he was having trouble performing his Cashier duties. Thus, on August 13, 1999 he returned to Dr. Kelemen's office. Dr. Hager noted that "based upon a shoulder injury the patient should be all means avoid working in forced positions of 90 degrees elevations and beyond." RX 5.

In September of 1999 Claimant had nuclear spin tomography of his right shoulder joint performed by Dr. Rosar. CX 35. Dr. Rosar's conclusions gave rise to doubt about the success of the surgery previously performed by Dr. Hager, according to Claimant. Therefore, Claimant decided to change doctors. In October of 1999, he selected Professor Dr. Kohn, the Director of Orthopaedics at the University of Homburg.

Dr. Koln described Claimant's condition to be "dead arm syndrome and interior shoulder instability right should/arm." RX 6; CX 6. Dr. Koln stated that Claimant's "right arm has a permanent restriction in movement of 50% and functional use/loss of 80%." *Id.* Dr. Koln concluded that Claimant could return to work as of November 7, 1999, with restrictions as follows: "arm has to be on the side of the body. Physical work is impossible. Light duties at a desk, including PC keyboard is possible." *Id.*

On November 4, 1999, Dr. Kohn wrote that "for health related reasons, [Claimant] is only able to perform minor office work or work at a personal computer." CX 35. Claimant again saw Dr. Kohn on April 30, 2001, wherein Dr. Kohn issued the same work restrictions. RX 6;CX 6.

In April of 2000 Respondents sent Claimant to London for a medical examinations. Professor Povlsen, Consultant Orthopaedic Surgeon and Physiotherapist Helen Puckey prepared reports of the results of their examinations. *See* RX 7; RX 8.

Dr. Povlsen examined Claimant and reviewed his medical file on April 13, 2000. RX 7. He diagnosed Claimant with congenital hypermobility; recurrent right shoulder subluxation, and post surgical right should pain and limited range of motion. *Id.* He concluded that Claimant's pain and loss of function/range of motion were likely to continue without further treatment. *Id.* He opined that there was "no reason why the claimant should not be able to carry out light, variable office duties." *Id.*

PT Puckey saw Claimant and performed a Functional Capacity Evaluation on April 14, 2000. RX 8. Her report included the following observations and conclusions:

> Claimant admitted to adaptive behavior in his daily life (personal care, driving, shopping, housework, gardening, and hobbies);
>
> Claimant engaged in pain magnification and symptom exaggeration;
>
> Claimant's movement patterns were consistent throughout the testing, even when he was unaware of being observed;
>
> Claimant demonstrated reliable and consistent efforts during the physical testing of his range of movement and strength. Claimant exhibited a moderate to severe loss of range of movement; a moderate decrease in right-sided strength;
>
> Claimant exhibited unreliable and sub maximal effort during right hand testing to assess his strength and generation of force;
>
> In all of the tests completed, the right hand was seen to be weaker in comparison to the left, which is inconsistent with Claimant's right-hand dominance and thus suggestive of a right upper extremity problem; and

> Claimant displayed inability to use his right arm in a useful way during the dynamic lifting assessment.

RX 8. PT Puckey suggested that Claimant

> is suited to an occupation that involves only very occasional light lifting activities that can safely be accomplished using his left arm only. He would appear suited to a desk-based position, where the workstation does not necessitate any sustained reaching activities with his right arm and where he would be able to vary the tasks accomplished as necessary, to avoid any sustained stresses through his right arm. . . [he] would be suited to an education or supervisory occupation, where minimal hands-on involvement is required, but where he could still make good use of his education and experience.

Id.

In October of 2001, Respondents again sent Claimant for a medical examination. Dr. Mueller examined Claimant on October 24, 2001. *See* CX 7. Dr. Mueller found no significant improvement or deterioration in Claimant's condition. CX 7.

On September 20, 2002, Claimant was examined by Dr. Stargardt, an orthopedic surgeon. *See* RX 31. Upon examination, Dr. Stargardt diagnosed Claimant with severe limitation of motion and persistent pain as well as severe function loss of the right shoulder and arm; postoperative sensory loss; muscle atrophy; and muscle spasm. RX 31. He concluded that reaching and external rotation are impossible, as is hard physical work with the right arm and hand. *Id.*

Claimant testified that he understood his condition to include instability and "Dead Arm Syndrome," with floating bone chips. Tr. at 55. He testified that he has nerve damage and severe atrophy. Tr. at 56. At the hearing, Claimant described his current condition as worse than after the accident. He stated that he has no strength in his arm movements and repeated motions cause stress and tightening in his shoulder and neck. Tr. at 57-58.

Claimant's Work History

Claimant was honorably discharged from the United States Air Force in 1994. CX 10. Thereafter, he remained in Germany and worked for NAF, 86 Services Squadron as maintenance personnel on the Ramstein Air Force Base.[4] Tr. at 43-45. He was initially hired to work on the base

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[4]NAF refers to non-appropriated funds. As explained by Respondents' counsel,

> NAF positions are positions that are paid from funds which are not appropriated by Congress. They are paid for from funds that are generated by the agency. Not necessarily 86 Services Squadron in particular. 86 Services does generate funds, but there's also a larger pot of money generated all over the agency, all over the United States Air Force, all over the Department of

at the Ramstein Enlisted Club as a plumber. Tr. at 46. As a plumber, he performed plumbing tasks, as well as all maintenance, changing lights, roof work, electrical, and air conditioning services. *Id.*

Claimant was then moved into the position of Maintenance Supervisor, and then Maintenance Control Clerk at the Ramstein Enlisted Club. *Id.* As Maintenance Control Clerk, his duties began to include less physical activity. He trained and maintained a crew to take care of the maintenance at his direction and he focused more on the paperwork. Tr. at 47. He was responsible for maintaining and filing reports for everything that was "fixed, touched, worked on, or inspection RWP, recurring work program." *Id.* (sic.) The Maintenance Control Clerk position was full-time and he earned $10.67 per hour. Tr. at 50; *see also* CX 12. According to the LS-208 filed by Respondents on September 26, 2002, his average weekly wage was $434.89, resulting in a compensation rate of $289.93 per week.[5] RX 3; Tr. at 50. In addition, he had logistic support from the base. This included gas, registration of vehicle with license plates, lower cost insurance, no road taxes, and access to the PX, commissary, bowling alley, etc. *Id.* He paid federal taxes and social security. *Id.*

Claimant was injured on June 11, 1996 while working in this position. He was placed on temporary total disability. He returned to work after shoulder surgery. On June 30, 1998 Claimant received an positive performance evaluation, CX 8, and on August 11, 1998, he received an Annual Performance Award. CX 9.

On August 14, 1998 Claimant re-injured his shoulder. He was examined by Physician Assistant Susan Anspach, who found muscle strain/spasms. CX 11-14. PA Anspach found that Claimant could return to light duty work on August 19, 1998, and to regular work on August 20, 1998. CX 11.

On September 9, 1998, Claimant's primary treating physician, Dr. Kelemen, cleared Claimant to return to work on September 11, 1998, subject to work restrictions of "no activities over head; no lifting of heavy weights (over 10 kgs.)."[6] Tr. at 95; RX 5.

> Defense, which comes from non-appropriated fund sources. Those non-appropriated funds can be used to pay for non-appropriated fund jobs. The 86 Services Squadron, as is the case with many organizations, has in it both appropriated fund positions and non-appropriated fund positions. The position to which Mr. Boisvert was hired and all of the positions that related to his employment with the employer are non-appropriated fund positions.

Tr. at 45.

[5]The court notes that this is not the average weekly wage at the time of injury that the parties stipulated to in JX 1. For purposes of ordering an award, compensation will be based upon the average weekly wage stipulated by the parties, or $426.80, resulting in a compensation rate of $284.53 per week.

[6]10 kilograms is approximately 22 pounds.

On September 11, 1998, Claimant returned to his position as Maintenance Control Clerk in a light duty status. Tr. at 96-97. However, by letter dated September 28, 1998, Mr. Bouchy, Manager of the Ramstein Enlisted Club, informed Claimant that there were no light duties available in the Enlisted Club. RX 9. Mr. Bouchy's letter stated that Claimant's assigned position "requires continuous lifting and strenuous work of some degree. He is also required to reach upward above his head often when he is working on air conditioning units and refrigeration." *Id.* The letter also noted that Claimant "indicated he did not desire to retrain as a Cashier, as the salary was much less than his current position." *Id.*; *see also* Tr. at 99-100. Therefore, Claimant was let go from his employment. On September 28, 1998, Respondents resumed temporary total disability payments to Claimant, as there were no other light duty positions available for him at the time. RX 3; *see also* CX 15; 17. As a result of this injury, Respondents paid Claimant temporary total disability compensation in the amount of $46,843.36 from August 18, 1998, through November 24, 2001. RX 3.

On October 6, 1998, Claimant reached maximum medical improvement ("MMI"). JX 1. Claimant was assigned permanent work restrictions of no activities over head and no lifting over 10 kgs. on periodic check-ups through July 17, 1999. RX 5.

By letter dated July 6, 1999, Mr. Bouchy offered Claimant the position of Cashier/Checker in the Ramstein Enlisted Club at an hourly rate of $5.31 per hour. RX 10; *see* RX 25 (position description). This job offer was extended to Claimant because he was unable to perform his duties of his job as Maintenance Control Clerk due to his permanent work restrictions. *Id.* The letter also noted that Claimant would receive compensation for the difference between the average weekly wage of his former position and the average weekly wage of this new position. *Id.* Further, the letter informed Claimant that should he decline this job offer, the Air force would nevertheless reduce his disability compensation to the amount of compensation he would have received if he had accepted the offer, and action may be initiated to terminate his employment. *Id.* Finally, failure to respond to the offer within four days would be considered a declination. *Id.*

By letter dated July 12, 1999, Claimant told Mr. Bouchy he could not accept or decline the job until he consulted with Dr. Kelemen. RX 11. He requested a copy of the job description and noted that upon receipt, he would arrange a meeting with his doctor. *Id.*

By letter dated July 13, 1999, Claimant confirmed that he had received the requested job description, but told Mr. Bouchy he could not get an appointment with Dr. Kelemen until August 16, 1999. RX 12. Claimant requested clarification of several of the job duties and asked that any questions be referred to his attorney. *Id.*

By letter dated July 14, 1999, Mr. Bouchy informed Claimant that the offered position was "specifically selected because of the physical limitations provided by a competent physician." RX 13. He therefore ordered Claimant to report to work on July 19, 1999, and noted that "[a]ny further delay . . . will be considered a declination. . ." *Id.*

On July 14, 1999 Claimant accepted the position, but requested leave without pay ("LWOP") from July 19, 1999, through August 6, 1999, to take a pre-planned vacation. RX 14; RX 15. By letter dated July 16, 1999, Mr. Bouchy approved Claimant's request and instructed him to report to work on August 9, 1999. RX 16.

On July 17, 1999, the Saturday before his Monday vacation departure, Claimant went to see Dr. Kelemen, who prescribed the same work restrictions he had prescribed seven times before - no overhead activity and no lifting over 10 kgs. RX 5.

On August 9, 1999, Claimant reported to work. Tr. at 113. Mr. Bouchy asked Claimant to sign a statement promising to abide by his work restrictions, but he refused, saying he wanted to talk to his lawyer before signing. RX 17; Tr. at 113. He never signed the statement. Tr. at 120.

Claimant worked four days from August 9, 1999, to August 12, 1999, for a total of 24 hours. RX 29; Tr. at 115. On August 13, 1999, Claimant called in sick. RX 29; Tr. at 115. He went to see Dr. Kelemen who gave him a duty excuse through August 22, 1999, but prescribed essentially the same work restrictions: "avoid working in forced positions of 90 degrees elevations and beyond." RX 5.

In a letter to Respondents, Claimant's attorney asserted that the duties of the Cashier position violated Claimant's work restrictions because the bottom of the Cashier touch screen was at shoulder height. She also noted that the Cashier position was inadequate because the tasks aggravated his right shoulder; however, the court noted at the hearing that there were no restrictions against Claimant's repetitive use of his left arm to complete the job duties. Tr. at120-122. Finally, Claimant's counsel informed the employer that Claimant "will not be able to perform that aspect of the job [the cash register] until or unless it can be altered to meet his physical requirements." Tr. at 124. Claimant made the same assertions at his deposition. Tr. at 118. However, he testified a the hearing that the job neither required him to do overhead work or lift more than 10 kgs. Tr. at 119. Claimant returned to the Cashier position on August 23, 1999, absent any modifications by the employer. In fact, he testified that he liked the job. Tr. at 124-125.

Following an EEO complaint filed by Claimant,[7] Mr. Bouchy immediately adjusted Claimant's work environment so that it was satisfactory to Claimant and he agreed to make further adjustments, such as building a portable platform that Claimant could stand on while performing Cashier duties which would weigh no more than 10 kgs. so Claimant could carry it to the various cash registers. Tr. at 131-132. Claimant thereafter settled his EEO complaint, whereby both employer and Claimant promised to ensure that Claimant worked within the prescribed medical restrictions. These restrictions again included no overhead lifting, no lifting over 20 pounds, avoidance of working in

[7]The details of the EEO complaint are irrelevant to this compensation claim, therefore, the court declines to address the specifics of that claim. Documents concerning the EEO settlement agreement are found at RX 28.

forced positions of 90 degrees elevations and beyond.[8] Claimant returned to his Cashier job on October 20, 1999, however, for reasons that are not in the record, he did not work his scheduled days thereafter. TX 29.

On November 2, 1999, Claimant went to see Dr. Kohn. Dr. Kohn was not Claimant's primary treating physician and Claimant never asked Respondents for permission to switch from Dr. Kelemen to Dr. Kohn, nor did Respondents consent to a switch. Tr. at 135. Dr. Kohn, however, prescribed more limiting restrictions, including that the arm was to be on the side of the body and that physical work was impossible. Dr. Kohn suggested that light duties at a desk, including PC keyboard, was possible. Tr. at 134; RX 6. Claimant never returned to his Cashier position. Tr. at 134. On November 4, 1999, Respondents again resumed temporary total disability payments. CX 19.

On January 15, 2000, Private Investigator Glazer observed Claimant washing his Mustang for a period of at least 15 minutes. RX 34. Glazer testified that he viewed Claimant holding the hose with his left hand, doing circular movements with his right. Tr. at 210-212. He stated that while performing this motion, Claimant showed no signs of discomfort. *Id.*

On March 3, 2000, Mr. Bouchy noted that "based on the extreme limitations of the latest physical profile on [Claimant]" he had no positions available which he Claimant could perform. CX 20. Accordingly, Respondents continued to pay temporary total disability compensation to Claimant. CX 21.

During the Spring of 2001, Claimant attended a hunting class, during which he performed three marksmanship tests that required him to perform movements which were inconsistent with his claim of disability. Tr. at 177-192 (Claimant testimony); Tr. at 267-291 (Lane testimony).

By letter dated November 19, 2001, Human Resources Officer Moore instructed Claimant to report to work on November 26, 2001. RX 18; CX 23. He was assigned to the position of Recreation Aid (Front Counter) at the Ramstein Bowling Center. *see* RX 25 (position description). This position was part-time and paid a wage of $5.66 per hour. CX 29.

On November 26, 2001, Claimant reported to Mr. Craig, Manager of the Bowling Center. Tr. at 238. Mr. Craig in-processed Claimant as he in-processed all new employees. He gave Claimant several documents, including a position description, and asked Claimant to sign for them. Claimant refused, stating he wanted his lawyer to review them. Tr. at 238-239 RX 19. During in-processing, Mr. Craig also told Claimant that his work schedule would be posted near the time clock and handed him his first work schedule for the period from November 25, 2001 through December 8, 2001. Tr. at 242. The initial schedule required Claimant to work on November 27, 2001. Tr. at 10; RX 22.

[8]These are the same restrictions that Dr. Kelemen, Claimant's primary treating physician, has issued since Claimant's right shoulder injury.

On November 26, 2001, Claimant's counsel faxed a letter to Mr. Craig. *See* RX 20. She cited the work restrictions suggested by Physical Therapist Puckey and concluded that three duties of Claimant's new job were outside those restrictions.[9] Tr. at 241-242; RX 20. She stated that several of the job responsibilities were not within Claimant's physical limitations and that Claimant could not perform such duties. *Id.* However, at the hearing, Claimant testified that this position did not require any overhead work nor lifting of greater than 20 pounds. Tr. at 149.

Upon receipt of Claimant's counsel's letter, Mr. Craig informed Claimant that if he was not able to do the work, he must present a statement from his physician. RX 19. Claimant never did so. However, on November 27, 2001, he reported to work. Tr. at 162. Claimant refused to perform several of the job duties, claiming that they were in violation of his work restrictions. Tr. at 162. He informed Mr. Craig that he could not perform physical work and insisted that he be assigned to a desk job with a PC. Tr. at 163; 244; RX 19. Mr. Craig attempted to oblige and said he would look into the possibility of assigning Claimant to a data entry position in the mechanic's office. RX 19; Tr. at 164, 170, 240. In the interim, Mr. Craig advised Claimant to perform the duties he could perform. Tr. at 241.

On November 29, 2001, Claimant reported for work. He worked the front counter with Charles Ribkee. Tr. at 164. Mr. Ribkee informed Claimant of the job duties, but Claimant responded that he "wasn't allowed to do anything." Tr. at 312. Claimant would not perform a majority of the required tasks; he only handed out bowling shoes. Tr. at 313.

Claimant was scheduled to work again on December 4, 2001,[10] however, he called in sick. He told Mr. Craig that on November 29, 2001 he had injured himself while handling a pair of bowling shoes. Tr. at 168; 245; RX 19; *see also* RX 35. Claimant testified that constantly bending down and picking up shoes created a problem for him and that when issuing a pair of shoes, his arm "jolted." Tr. at 165. Claimant informed Mr. Craig that his attorney would be sending a memo to re-define his work restrictions. RX 19; Tr. at 168.

On December 5, 2001, Claimant's counsel faxed a letter to Mr. Craig.[11] Tr. at 241; RX 21. Counsel cited the work restrictions suggested by PT Puckey, not those prescribed by Dr. Kelemen, and erroneously stated that Claimant's restrictions mandated assignment to a "desk based position."

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[9]Claimant was evaluated and assessed by PT Puckey on April 14, 2000. *See supra* page 9. Claimant's counsel cited the following suggestions by PT Puckey as Claimant's work restrictions: (1) Occupation that provides for a desk based position; (2) Very occasional light lifting that can be accomplished using the left arm alone; (3) The workstation must not necessitate any sustained reaching activity with the right arm; and (4) Freedom to vary tasks as needed to avoid stress through the right arm.

[10]Claimant was originally scheduled to work on Saturday, December 1, 2001, however, he asked management for weekends off because of family obligations. Employer granted his request and revised the schedule.

[11]Although the letter was signed by Claimant, he testified that his counsel had written it.

She advised Mr. Craig that she had instructed Claimant to leave the work site if he was not given a desk job. RX 21.

Mr. Craig graciously agreed to provide Claimant a desk job as a data entry clerk in the mechanic's area, working for Mr. Brewington. Mr. Craig instructed Mr. Brewington, the Chief Mechanic, to set up the work station according to Claimant's needs. Tr. at 253.

On December 11, 2001, Claimant arrived at the Bowling Center. Mr. Brewington informed Claimant that he had been reassigned by Mr. Craig from the front counter to a desk job in Mr. Brewington's office. Mr. Brewington told Claimant that he had an inventory program in Excel that needed to be "brought online." Tr. at 294-295. Mr. Brewington told Claimant that the job was "strictly inventory - typing stuff into a computer." Tr. at 301.

Mr. Brewington showed Claimant to the work area and informed him that if it was not suitable, he could have it reconfigured and obtain whatever new equipment Claimant might want. Tr. at 296-300. Mr. Brewington also discussed Claimant's work schedule. It showed that Claimant was scheduled to work December 13, 14, 18, 20, and 21, 2001. Mr. Brewington said that although he could not change that schedule, after it expired, he could adjust it to suit Claimant's needs. Tr. at 297. He said Claimant could work whenever he wanted, within business hours. He told Claimant that although he had to work at least 20 hours per week, he could work 40 if he wished, and overtime was also possible. Tr. at 301.

According to Mr. Brewington, Claimant said, "this sounds nice. I appreciate your trying to help me, but you're getting caught in the middle of something. I have to check with my people." Tr. at 296. Claimant then left through the back door and made a phone call. Tr. at 296; 298. Mr. Brewington did not see Claimant again. Claimant did not return to work that day, nor did he report for work on either December 13, 14, 18, 20 or 21, 2001. Tr. at 299.

After Claimant failed to report for work on three consecutive scheduled days, employer deemed him to have abandoned his position and terminated him effective January 3, 2002. Tr. at 299-300. By letter addressed to Claimant, John Pajala, Assistant Manager at Ramstein Bowling Center, notified Claimant of his termination for abandonment. RX 23.

Suitable Alternate Employment

On September 10, 2002, Paul Johnson submitted a Labor Market Survey concerning Claimant. *See* RX 24.[12] Mr. Johnson holds a Masters Degree in Psychology and is currently a self-employed vocational consultant; he possesses the experience and qualifications necessary to constitute

[12]Mr. Johnson was also deposed by telephone on November 30, 2002. During this deposition, Mr. Johnson explained the findings and results he reached, as described in the Labor Market Survey.

a vocational evaluation expert for issues arising under the Act.[13] RX 30; RX 36. Mr. Johnson met with and tested Claimant on August 21, 2002. In compiling his report, Mr. Johnson included the test results, conclusions formed as a result of his interviews and assessment of Claimant, his work history, educational background, skill level, and vocational abilities. RX 24 Mr. Johnson reviewed Claimant's medical history and status, as well as PT Puckey's Functional Capacity Evaluation. *Id.*

Mr. Johnson concluded that the Cashier position at the Enlisted Club at Ramstein, which Claimant performed for several months, was consistent with the work restrictions then-prescribed by Claimant's primary treating physician Dr. Kelemen, as well as those prescribed by PA Anspach, who, on September 24, 1998, opined that Claimant was able to work 8 hours per day, with limited right arm use and no work above his shoulder. RX 24.

In addition, Mr. Johnson concluded that the duties of the Recreation Aid (front Counter) position at the Ramstein Bowling Club were consistent with the work restrictions then-prescribed by Claimant primary treating physician Dr. Kelemen. RX 24 Finally, Mr. Johnson concluded that the Inventory Specialist position that Claimant was offered at the Ramstein Bowling Center was consistent with the work restrictions then-prescribed by Claimant's primary treating physician, Dr. Kelemen. *Id.*

Mr. Johnson then assessed and made findings concerning Claimant's ability to secure other employment. RX 24. He based his conclusions on accepted practices of a transferability of skills evaluation. *Id.* He determined that four job titles were consistent with Claimant exercising transferable skills, his vocational tests scores and his designated work restrictions. *Id.* They were therefore considered suitable alternate employment for Claimant: inventory clerk, office clerk, auto rental clerk, and insurance clerk. *Id.* Mr. Johnson then researched these positions for availability with the U.S. Army in Germany, as well as in the German economy. He found several positions available. *Id.*

Mr. Johnson submitted a supplement to his Labor Market Survey on September 19, 2002. RX 24. He included additional job openings within Claimant's medical restrictions and abilities that were available through the Army's Civilian Human Resource Management Agency (CHRMA). These included telephone operator, print clerical, computer clerk assistant, office automation clerical, and mail and file services. *Id.* In addition, Mr. Johnson located several job openings that were available through the Army in November of 1999. These included clerical assistant, telephone operator, office automaton clericals, and mail and file services. *Id.* Mr. Johnson again found additional job openings on January 3, 2002, which included operations assistant, cashier, and insurance clerk. *Id.*

Finally, Mr. Johnson concluded that "[t]here were suitable alternate employment opportunities offered to [Claimant] at Ramstein Air Base, and others available in the greater Kaiserslautern Military

[13]However, the court notes that Mr. Johnson is not an expert in the German economy. RX 36. Therefore, the court will take this into consideration upon assessing his results with regard to jobs in the German economy and provide weight accordingly.

community dating back to September of 1998; and additional suitable alternate employment opportunities on the German economy have existed since January 3, 2002 and continue to exist." RX 24.

Mr. Franz Peter Holzer testified at the hearing. Mr. Holzer is a German attorney who worked for the United States Army as the Chief of International and Legal Assistance Division where he rendered legal advice to soldiers in the Kaiserslautern area.[14] CX 24; Tr. at 20. He is familiar with what an American would have to do in order to work on the German economy. *Id.* Mr. Holzer testified that, in his expert opinion, considering the whole of Claimant's situation, Claimant's chances of securing a job on the German economy are "almost zero."[15] Tr. at 23.

Finally, on November 1, 2002, Debbie Kelly, Human Resources Assistant in the Kaiserslautern Civilian Personnel Advisory Center provided a Declaration as to the information she provided to counsels for both parties. *See* RX 37. Ms. Kelly is responsible for recruiting for vacant positions for Army non-appropriated funds. RX 37. Ms. Kelly relayed information concerning job vacancies, general hiring practices, pay setting authority, and disabilities; she noted that all of this information was available on the CHRMA website. *Id.*

Ms. Kelly also described her conversation with Claimant on October 11, 2002. *Id.* She stated that she advised Claimant of application procedures and he responded that he would be in right away. *Id.* Ms. Kelly stated that Claimant came into the office on October 15 or 16, 2002 and applied for a Cashier position. *Id.* She stated that he mentioned that his medical condition restricted him to no lifting over 20 pounds and no over shoulder work. *Id.* Ms. Kelly informed Claimant there was a Cashier position currently available at the Landstuhl Combined Club and she instructed him that he could go directly to the manager, Jeffrey Holmes, to inquire. *Id.* Ms. Kelly then spoke with the manager prior to in-processing Claimant and discovered that he was fully aware of Claimant's health condition and he felt it would pose no problem. *Id.*

Claimant is currently working part-time as a Cashier at the Landstuhl Combined Club on the Ramstein Air Force Base in Germany. CX. 28. This is a NAF job with the U.S. Army. He earns $6.50 per hour. *Id.* He has held this position since October 16, 2002. For his first two weeks, he worked 43.7 hours and earned $284.00. *Id.*

Disability Compensation Previously Paid to Claimant

As a result of Claimant's right shoulder injury, Respondents have paid compensation to Claimant as follows:

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[14]Mr. Holzer also taught several courses at the JAG school in Charlottesville Virginia. Tr. at 20.

[15]Mr. Holzer continued to testify about the permit requirements for a non-German citizen to be considered a registered worker able to obtain employment in Germany, as well as to the expenses, such as transportation and taxes, associated with employment in Germany. Tr. at 23-30; 33-35.

Type of Disability	From	To	$ Per Week	# Weeks Paid	Total $
Temporary Total	8/18/98	8/18/98	289.92	1/7	41.42
Temporary Total	8/21/98	9/10/98	28.92	3	869.79
Temporary Total	9/29/98	7/18/98	289.92	41 6/7	12,135.65
Temporary Partial	7/19/99	10/30/99	varies	14 6/7	2,484.06
Temporary Total	10/31/99	11/24/01	289.92	108	31,312.44

RX 3.

In addition, on July 10, 2002, Respondents tendered to Claimant a payment in the amount of $5,000.00, representing a "partial payment of any disability compensation which Respondents might owe Claimant as a result of [this] case." *See* Brower letter 7/10/2002.

CONCLUSIONS OF LAW

Failure to File a Notice of Controversion

Initially, the court will consider Claimant's contention that Respondents' failure to file a notice of controversion requires it to pay full compensation to the Claimant. Claimant argued that under the Act, "Respondents must pay full compensation to Claimant from the date that it terminated payment of benefits on November 26, 2001, until the date of the order in this adjudication, along with a 10% surcharge." Claimant's Brief at 19-20.

It is well established that the ten percent assessment of § 14(e) applies to a situation where an employer unilaterally suspends voluntary payments of compensation. If the employer does not file a notice of controversion as required by § 14(d) with the District Director within fourteen days of the date of suspension, and a controversy exists on this date between employer and claimant as to entitlement to further compensation, then the employer is liable for a ten percent additional assessment on the unpaid installments. *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984); *see also National Steel & Shipbuilding Co. v. United States Department of Labor (Holston)*, 606 F.2d 875 (9th Cir. 1979);*National Steel & Shipbuilding Co. v. Bonner* , 600 F.2d 1288 (9th Cir. 1978);

Claimant has misconstrued the results of a failure to file a notice of controversion. According to the Act, failure to file a notice of controversion does not automatically entitle Claimant to payment of benefits. Rather, such failure entitles Claimant to receipt of a ten percent penalty assessment until such time as the notice is filed. In a case, such as this, where the employer has paid some compensation voluntarily and fails to controvert the remainder, if the claimant ultimately is awarded compensation in an amount greater than that which the employer voluntarily paid, the employer's

liability under § 14(e) is based solely on the difference. *Bonner*, 600 F.2d at 1295; *see also* 33 U.S.C. § 902(12) (the penalty applies only to "installment of compensation not paid within 14 days").

Respondents did not dispute that a notice of controversion was not filed within two weeks of the suspension of benefits on November 26, 2002. Therefore, should the court find that Claimant is due additional compensation based upon a loss of wage earning capacity, a ten percent assessment shall be levied against Respondents.

Claimant contended that this assessment is to be calculated from the date of suspension, November 26, 2001, until this order is issued. However, as the case law shows, the assessment terminates on the date that a proper notice is actually filed, or the date that the Department of Labor receives notice of the facts that a proper notice of controversion would have revealed.

In *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75 (1984), the Benefits Review Board ("Board") held that "a notice of suspension filed within fourteen days of cessation of payments which provides the information required by § 14(d), including the reasons for suspension, is the functional equivalent of a notice of controversion and precludes application of the § 14(e) ten percent assessment. *White*, 17 BRBS at 79. In so holding, the court noted that the primary purpose of the § 14(e) assessment is to motivate the employer to bring all disputes to the attention of the Department of Labor. *Id.* Accordingly, liability for the assessment terminates after the Department of Labor receives *any* mode of notice which contains the same information as a notice of controversion. *Id.* (emphasis in original); *see, e.g.*, *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d at 880 (the date of informal conference is an appropriate cut-off date); *Spencer*, 16 BRBS at 209 (liability terminates on the date employer files its pre-hearing statement).

In this case, Respondents filed a form LS-208 - Notice of Final Payment or Suspension of Compensation Payments - on September 26, 2002. RX 3. This form included the information required by § 14(d), including, the names of the Claimant and the employer, the date of the injury, and the grounds for termination or suspension of payments. In accordance with *White*, it is the functional equivalent of a notice of controversion for purposes of avoiding the ten percent assessment of § 14(e). However, it was not filed within fourteen days of the suspension of benefits. Any penalty assessed against Respondents under § 14(e) therefore begins on the date of suspension, November 26, 2001 and ends on the date of filing the LS-208, September 26, 2002.

Claimant's Authorized Primary Treating Physician

Next, the court will address the issue of whether Dr. Kohn can be considered Claimant's primary physician of record. Claimant contended that he switched to Dr. Kohn in November of 1999 when test results caused him to question the effectiveness of the treatments he had been receiving from Drs. Hager and Kelemen. Claimant argued that the evidence shows that Respondents acquiesced in the switch: (1) Claimant informed Respondents that he was changing doctors; (2) Respondents did not indicate that such change created a problem; (3) Dr. Kohn submitted LS-204 forms to Respondents; (4) Respondents relied upon Dr. Kohn's assessment of Claimant in payment

of benefits; and (5) Respondents paid Dr. Kohn for his services. Therefore, Claimant contended that Respondents cannot, for the first time at the hearing, argue that Dr. Kohn was not Claimant's primary treating physician.

Respondents contended that Dr. Kohn's restrictions had no legal force or effect because he was not Claimant's primary treating physician. Claimant never asked Respondents for permission to switch from Dr. Kelemen to Dr. Kohn, nor did Respondents consent to a switch. Therefore, although Dr. Kohn may have been a doctor who treated Claimant, he was not the authorized treating physician.

Section 7(c)(2) of the Act provides that an employee may not change physicians after his initial choice of physicians unless the employer, carrier, or district director has given prior consent for such change. *See* 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406 (change of physicians; non-emergencies); *see, e.g.*, *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404 (1979) (where employee failed to request his employer to furnish or authorize additional medical services, he was not entitled to recover for medical services by physician of his choosing).

While it is true that provisions of the Act are generally to be liberally construed for the benefit of the claimant, a court cannot blatantly act in opposition to the plain language of the Act under the guise of liberal construction. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 51 (19750 (citations omitted). The statute is clear that a change in physicians must be approved by the employer, carrier, or district director in advance. Tacit acquiescence after the fact is not equivalent to prior authorization.

To the contrary, Claimant pointed to a Ninth Circuit case as evidence that substantial compliance with the provision of § 907 is all that is necessary. *See Nardella*, 525 F.2d at 51. The relevant facts of *Nardella* are as follows:

> [Claimant] informed the employer's superintendent that he could no longer continue to work and was going to be examined by a physician. He then was treated by Dr. Brandon who became [claimant's] primary physician. Shortly thereafter, claimant delivered a note written by Dr. Brandon to the employer's personnel office informing that claimant would be disabled for at least a month. Following the advice of Dr. Brandon, [claimant] received medical care and treatment from other physicians. At no time did claimant request his employer to provide him with this treatment. In addition, the other treating physicians failed to report within twenty days after examination as provided for by the Act.

Nardella, 545 F.2d at 50. The ALJ held, and the Board agreed, that the employer was given prior notice, if not necessarily in the form of a written request, that Dr. Brandon was to treat claimant. *Id.* Thus, the claimant had "substantially complied" with § 907 requirements and employer was responsible for payment of the medical bills for Dr. Brandon. However, the ALJ also held, and the Board agreed, that employer was not responsible for the payment of medical bills for the remaining

doctors who treated claimant, as there was no notification given to, or authorization given by, employer prior to treatment. *Id.* Thus, there was no "substantial compliance." Accordingly, the Board reached the decision that based upon the actions of the claimant in notifying employer, prior to receiving treatment, he had substantially complied with the requirements of § 907. *Id.*

This differs dramatically from the situation present in this case. Here, Claimant is urging the court to find that Claimant substantially complied with § 907 based upon the actions of the Respondents.[16] This the court cannot do. The court is unable to find any case where a Circuit Court, the Board, or an ALJ ordered payment of medical bills or declared a primary treating physician based upon the post-treatment action or inaction of the employer or carrier. Rather, relaxation of the prior authorization requirement has occurred only where actions by the claimant can be said to have put employer on notice of treatment by a physician or a change in treating physician. *See, e.g.*, *Davenport v. Norfolk Shipbuilding & Dry Dock Co.*, 2000-LHC-00756 (Feb. 15, 2001) (ALJ) (prior authorization not necessary for a change in physician where the primary physician required a second opinion); *Dickerson v. Atlantic Container Service, Inc.*, 2000-LHC-03015 (Dec. 3, 2001) (ALJ) (explicit prior authorization not necessary where the evidence showed that claimant did in fact receive prior authorization based upon employer's action before the switch). In this case, despite Claimant's brief to the contrary,[17] the court can find no evidence of any action on the part of either Claimant, or Claimant's treating physician, Dr. Kelemen, that would constitute "substantial compliance" with the prior authorization requirements of § 907(c).

Accordingly, Claimant's failure to request his employer to furnish additional medical services or to authorize such services was contrary to the Act. The court declines to hold that based upon the failure of Respondents to inform Claimant of proper procedures, Claimant can assert now that he did in fact solicit and procure prior authorization to change his treating physician. Claimant's failure to comply with the requirements of the Act is exacerbated by the fact that he had obtained legal counsel prior to seeking further medical assistance, and therefore, has no excuse for failing to obtain authorization from his employer.[18] Claimant's authorized treating physician is considered to be Dr. Kelemen for the remainder of the analysis in this case.

Disability Compensation Due Claimant

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[16]Claimant contended that there is no evidence that Respondents indicated that Claimant's change of physician was unacceptable, rather, Claimant argued, that Respondents implicitly consented to the switch by not protesting, by accepting Dr. Kohn's LS-204 forms, and by paying Dr. Kohn for his services.

[17]Claimant contended that he "informed the employer Air Force that he was changing doctors." Claimant's Brief at 22. The court finds no evidentiary support for this statement. To the contrary, Respondents emphatically state that they had no prior notice of Claimant's intent to switch doctors. Furthermore, at no time did Drs. Kellemen or Hager suggest that Claimant seek a second opinion or consult a "specialist."

[18]Claimant retained the services of counsel on September 24, 1998 (CX 35-1) and did not see Dr. Kohn until November, 1999.

There is no dispute that Claimant was injured while in the course and performance of his employment with Respondents. Moreover, there is no dispute that Claimant has been paid periods of temporary total and temporary partial disability by Respondents since this injury. Therefore, the only remaining issue is to determine whether Claimant is entitled to any further disability compensation.

The Act authorizes compensation to workers injured in the course of their employment. In order to gain an award of benefits for total disability under the Act, a claimant may first establish a *prima facie* case by demonstrating that he cannot perform his prior employment due to the effects of a work-related injury.[19] *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997). Once a *prima facie* case has been established, the burden shifts to the employer to demonstrate "the availability of suitable alternate employment which the claimant is capable of performing." *See, e.g., Newport News Shipbuilding & Dry Dock, Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

An employer may satisfy its burden in two ways. First, the employer may itself make available to the injured employee suitable alternate employment. *Norfolk Shipbuilding and Dry Dock Co., v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999) (citing *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 688 (5th Cir. 1996)). Second, the employer may demonstrate that suitable alternate employment is available to the injured worker in the relevant labor market. *See See v. Washington Metropolitan Area Transit Auth.*, 36 F.3d 375, 380-84 (4th Cir. 1994). To make the latter showing, "an employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform." *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988).

Claimant was unable to return to his pre-injury job. Therefore he has established a *prima facie* case for total disability. The burden then shifted to Respondents to show suitable alternate employment.

An employer can meet its burden of establishing suitable alternate employment by offering the claimant a job in its facility, including a light-duty job. *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984); *Darden v. Newport news Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). The

[19] Disability under the Act is "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). In order to establish a *prima facie* case of total disability, claimant need only establish that he cannot perform his usual employment. He need not establish that he cannot perform any employment. *Elliot v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). Claimant's usual employment is that which he was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 692 (1982).

court need not examine job opportunities on the open market if the employer offers suitable work. *Conover v. Sun Shipbuilding & Dry Dock Co.*, 111 BRBS 676, 679 (197).

Ramstein Enlisted Club Cashier Position # 1

Claimant was injured on August 14, 1998. He was paid temporary total disability payments. He returned to his job and worked until September 28, 1998 in a light duty status. However, because his job required duties beyond his work restrictions, he was not able to continue in this position. On September 28, 1998 Respondents offered Claimant the opportunity to retrain as a Cashier at the Ramstein Enlisted Club. However, there is no evidence as to the particulars of this position (job description, duties, pay, hours, etc.). It therefore cannot be sufficient to constitute suitable alternate employment. *See Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988) (employer must establish the precise nature, terms, and availability of a position in order for it to be considered suitable alternate employment). Respondents have not, thus far, met their burden.

Claimant was entitled to temporary total disability compensation. On September 29, 1998, Respondents properly resumed temporary total disability payments to Claimant in the amount of $289.93 per week. This continued until July 18, 1999. Thus, Respondent paid disability to Claimant for 41 6/7 weeks, amounting to $12,135.65.

Alternatively, Respondents contended that upon Claimant's refusal to accept the offered Cashier position, Claimant was obliged to search for suitable alternate employment and the Labor Market Survey conducted by Vocational Consultant Johnson indicates that such employment (with no loss of wage earning capacity) was available at that time. As Claimant admitted that he did not diligently seek alternate employment, Respondents argued they had no duty to pay Claimant any disability compensation during this time.

The court is not persuaded that Claimant could have obtained suitable alternate employment, either on the German economy, or on the Base, without a loss of wage earning capacity, by Respondents' offered labor market survey. First, concerning the jobs purportedly available on the German economy, as the court noted, *supra*, Mr. Johnson is not qualified as an expert on the labor market for Americans living in Germany. As testified to by Mr. Holzer, Claimant's chances for securing a job on the German economy were almost non-existent, considering the permit requirements and additional costs involved. In fact, Claimant was not even recognized in Germany as a registered worker able to obtain employment in Germany. Therefore, the court finds that the portion of the labor market survey which considers possible job opportunities for Claimant in the Germany economy is insufficient to establish suitable alternate employment.

Second, the court declines to impute to Claimant the ability to secure a suitable job on the Ramstein Air Base where Respondents show that such positions were, as Respondents did not offer these positions to Claimant. This case presents the novel concept of an "internal labor market survey." Generally, a labor market survey provides evidence of jobs that are available with other employers in the Claimant's surrounding area. However, here, the labor market survey is introduced to provide evidence of other jobs with the same employer. The court finds it curious that Respondents now argue that there were other jobs on the Base, which Claimant could have obtained, yet they did not offer these positions to him. Evidently, Claimant's case was at issue in the CHRMA, as they did in fact offer him several positions. However, they neglected to offer him any of the positions now listed as available in the labor market survey. It would, therefore, be unreasonable to impute to Claimant the ability to have obtained one of these jobs. In essence, by purporting that these positions were available, Respondents' failure to offer them to Claimant constitutes rebuttal of those positions as suitable alternate employment. Arguably, Claimant could not have obtained these positions, as they were not offered to him. Accordingly, the positions listed in the labor market survey as available to Claimant are sufficiently rebutted as having been suitable alternate employment by Respondents' failure to offer them to Claimant.

Ramstein Enlisted Club Cashier Position # 2

On July 6, 1999 Respondents assigned Claimant to a job as a Cashier at the Ramstein Enlisted Club.[20] After much 'ado about nothing,'[21] on July 14, 1999, Claimant accepted the job offer, and on August 9, 1999, he reported to work. Claimant worked uneventfully in this capacity until October 12, 1999, when he filed an EEO complaint, in which he demanded logistical adjustments in order to accommodate his work restrictions. Respondents so complied and a settlement agreement was finalized. However, on November 2, 1999, Clamant did not return to work without proper authority. Instead, he went to see Dr. Kohn, a non-authorized treating physician, who prescribed more limiting work restrictions. Claimant never returned to his Cashier position.

The court finds that this Cashier position constituted suitable alternate employment. It was a position that Claimant could perform, considering his age, education, work experience, and physical restrictions. *See Trans-State Dredging v. Benefits Review Bd. (Tarner)*, 731 F.2d 199 (4th Cir. 1984). The duties of this job were consistent with Claimant's work restrictions, as prescribed by his authorized treating physician, Dr. Kelemen. As noted, *supra*, Claimant was not in compliance with the requirements of the Act prior to seeing Dr. Kohn. Therefore, the restrictions suggested by Dr. Kohn have no affect under the Act and the position remained suitable alternate employment. Claimant has been unable to rebut the finding that this position was suitable. In fact, he testified that

[20]This appears to the court to be the same position that Mr. Bouchy previously offered, and Claimant declined, in November of 1998.

[21]*See* RX 10 through RX 16.

he liked the job. The Cashier job was part time and did not pay a wage equal to, or in excess of Claimant's pre-injury wage. However, it was sufficient to be considered suitable alternate employment, thus, Respondents met their burden. *See Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 (1985) (a part-time job may be suitable alternate employment); *Shiver v. U.S. Marine Corp.*, 23 BRBS 246 (1996) (a single job offer is sufficient to establish suitable alternate employment). Claimant was therefore entitled to permanent partial disability payments to compensate for the loss of wage earning capacity.

The job was offered to Claimant on July 6, 1999, thus, this is the earliest date that the employer has established suitable alternate employment. Thereafter, Claimant's total disability became partial disability. *See Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 91991); *Harrison v. Todd Pacific Shipyards Corp.*, 21 Crop., 21 BRBS 339 (1988); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

As a result of Claimant's acceptance of this Cashier position, on July 19, 1999, Respondents reduced his disability compensation to temporary partial payments. For the period between July 19, 1999, and October 30, 1999, Respondents paid compensation to Claimant in the amount of $2,484.06. However, as the suitable position was offered to Claimant on July 6, 1999, this is the date on which Claimant's disability should have been reduced from total to partial. Thus, Respondents overcompensated Claimant between July 6, 1999 and July 17, 1999.

When Claimant failed or refused to report to work on November 2, 1999, Respondents reinstated temporary total payments to Claimant beginning on October 31, 1999. These payments continued through November 24, 2001, approximately 108 weeks. During this time, Respondents paid a total of $31,312.44 in total disability payments to Claimant. However, Respondents met their burden of establishing suitable alternate employment as of July 6, 1999. Subsequent termination or abandonment of the job, not related to the disability, does not give rise to a reinstatement of total disability. See Mangaliman v. Lockheed Shipbuilding Co., 30 BRBS 29 (1996). Thus, Respondents overcompensated Claimant by inappropriately resuming total disability payments.

At this juncture, the court would like to take the opportunity to express its concern for the veracity and credibility of Claimant's testimony on several issues. Particularly relevant in this context is Claimant's failure to engage in adaptive behavior in this position, although he apparently had little difficulty doing so in his non-working activities.[22] Moreover, the court notes that upon the filing of the EEO complaint, Mr. Bouchy was extremely accommodating of Claimant's every request, yet Claimant never attempted to reciprocate or evidence a willingness to work. Rather, he simply sought

[22]*See, e.g.*, RX 34 (Claimant was observed washing his car in a manner not consistent with his injury); Tr. at 177-192; 267-291 (Claimant performed marksmanship tests that required him to perform movements which were inconsistent with his injury).

more limiting work restrictions and failed to return to work. This behavior seems consistent with Claimant's attitude from the beginning; he has resisted Respondents every effort to return him to work. This is particularly troubling to the court in light of the fact that he was represented by legal counsel at almost every step. Thus, although it is apparent that Claimant suffered, and still suffers, from his shoulder injury, the court seriously questions his testimony concerning his true ability to perform this job.

Ramstein Bowling Center Positions

Even assuming, *arguendo*, that the Cashier position was not suitable, Respondents continued to evidence their flexibility and efforts to provide Claimant with employment. By letter dated November 19, 2001, Respondents assigned Claimant to a job as Recreation Aid (Front Counter) at the Ramstein Bowling Center. The duties of this position were also consistent with the work restrictions prescribed by Claimant's authorized treating physician, Dr. Kelemen, thus it was sufficient to be considerable suitable alternate employment.

Claimant showed up for work at the Bowling Center, however, he refused to perform most of his job duties. Claimant's counsel sent correspondence to Claimant's supervisor, Mr. Craig, citing inapplicable work restrictions and suggestions as Claimant's excuse for not fulfilling his job duties. Although under no obligation to do so, Mr. Craig attempted to accommodate Claimant's needs as much as possible. He transferred him from the front counter to a "desk job" in the office of Mr. Brewington, the mechanic. This position consisted of data entry of inventory into an Excel computer application. Mr. Brewington informed Claimant that would arrange the work station in any way possible to meet Claimant's work restrictions. It is clear that Respondents were attempting to accommodate Claimant and keep him employed as much as possible. Rather than arranging a work schedule and training for this new position, Claimant left the work site to confer with his counsel, and never returned to the Bowling Center.

Claimant was scheduled to work at the Bowling Center on December 13, 14, 18, 20, and 21, 2001. This schedule was posted near the time clock at the Bowling Center. Claimant was made aware that he was on the schedule and of its posted location. However, Claimant failed to return to work on his scheduled days. Therefore, Respondents deemed him to have abandoned his position and terminated him, effective January 3, 2002.

Yet again, Respondents were successful in providing Claimant with suitable alternate employment. The data entry position was within Claimant's work restrictions, as prescribed by his authorized treating physician.

Claimant's counsel's determination that these positions were not in compliance with Claimant's work restrictions was not only inappropriate, it was in error. Counsel is not a medical professional, thus she is not qualified to reach the conclusion that offered positions were not within medical restrictions. This is the province of a medical professional. Moreover, Counsel's citations to suggested work conditions noted by Physical Therapist Puckey were incorrect. PT Puckey was not Claimant's primary treating physician. In fact, as noted at the hearing, PT Puckey was not authorized to issue medical restrictions. Dr. Kelemen's restrictions are those which had effect, and the Bowling Center positions were within those restrictions, thus they constituted suitable alternate employment.

Upon offering Claimant suitable alternate employment with a loss of wage-earning capacity, Respondent's should have continued payment of permanent partial disability payments to Claimant. Although this was not done, on July 15, 2002 Respondents tendered to Claimant a payment of $5,000 as compensation due for this period.

Landstuhl Combined Club Cashier Position

On October 16, 2003 Claimant was hired and in-processed into the Cashier position at the Landstuhl Combined Club.[23] The duties of this position are consistent with the work restrictions prescribed by Claimant's authorized treating physician, Dr. Kelemen. The Cashier job is part time and does not pay a wage equal to, or in excess of Claimant's pre-injury wage. However, it is sufficient to be considered suitable alternate employment. Claimant is therefore entitled to permanent partial disability payments to compensate for the loss of wage earning capacity to the present and continuing.

CONCLUSION

After full consideration of the record, it is the opinion of this court that Respondents have met their burden of establishing suitable alternate employment as of July 6, 1998, by offering Claimant the Cashier job at the Ramstein Enlisted Club. Claimant has been unable to rebut this finding, or display a diligent job search and a willingness to work. Moreover, Respondents repeatedly offered Claimant suitable employment in a continuing effort to keep Claimant employed within his restrictions. However, because such positions were part-time and paid a wage less than that which Claimant earned prior to his injury, he is entitled to compensation for his loss of wage earning capacity. Therefore, Claimant is entitled to permanent partial disability compensation beginning on July 6,

[23]The court notes that Claimant's current Cashier position is in essence the same position that Respondent's initially offered to Claimant September 28, 1998, which Claimant declined, as well as the Cashier position that Respondents again offered to Claimant on July 6, 1999, which Claimant accepted and worked until October, 1999.

1999, to the present and continuing in amounts consistent with this opinion, and as ordered below.[24]

Claimant's wage earning capacity is based upon the Cashier position offered to Claimant on

July 6, 1999, the first established suitable alternate job. This position allowed Claimant to work approximately 20 hours per week and earn $5.31 per hour.[25] Thus, his post-injury average weekly wage is $106.20. Prior to his injury, Claimant worked 40 hours per week and earned $10.67 per hour. Thus, his average weekly wage at the time of injury was $426.80. Claimant therefore sustained a loss of wage earning capacity in the amount of $320.60 per week, resulting in a partial disability compensation rate of $213.73 per week.

Claimant was entitled to total disability compensation between September 29, 1998 and July 5, 1999; Claimant was paid total disability in the amount of $289.93 per week during this time. Claimant was entitled to partial disability compensation between July 6, 1999 and July 18, 1999; Claimant was paid total disability in the amount of $289.93 per week during this time. Thus, Claimant received overcompensation in the amount of $130.63.[26] Claimant was entitled to partial disability compensation between July 19, 1999, and October 30, 1999; Claimant was paid partial disability during this time. Claimant was entitled to partial disability compensation from October 31,

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[24]The Court notes that Claimant's current job places him in the same situation he was in on July 6, 1999, when Respondents offered him a strikingly similar Cashier position. "Section 28(a) of the Act authorizes an award of attorney fees only if the claimant utilized the services of an attorney at law in the *successful prosecution* of his claim. The clear and unambiguous language of this provision compels only one interpretation: attorneys fees may be recovered only if the claimant receives increased compensation or other benefits from the Act." *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991) (emphasis in original). Despite the recognition of an additional § 14(e) penalty assessment, Claimant is not receiving greater compensation from this Decision and Order than he would have received from the voluntary payments Respondents agreed to make four and a half years ago. Therefore, as Claimant's counsel's services have not resulted in successful prosecution within the meaning of the Act, the court finds that Claimant's counsel is not entitled to an award of attorney's fees. The irony of this case is not lost on the court. After years of turmoil and dispute, Claimant now stands in the same shoes he was in at the beginning of this controversy, i.e., part-time Cashier with partial disability compensation equal to two-thirds of the difference between the average weekly wage of his former position and the average weekly wage of his new position. *See* RX 10.

[25]Although Mr. Brewington stated that Claimant was capable of working up to 40 hours per week, with a possiblity of overtime, such a work schedule was never implemented. Therefore, the court's analysis is rendered in accordance with published work schedules, which showed that Claimant worked approximately 20 hours per week. This is not to suggest that Claimant is not capable of working a full-time position. To the contrary, the court feels that Claimant is physically able to work full time. However, because Respondents failed to demonstrate to the court that a guaranteed full-time position has been made available to Claimant, the assumption is that Claimant's current earning capacity is based upon a part-time job.

[26][$289.93 x 1 5/7 weeks = $497.02] minus [$213.73 x 1 5/7 weeks = 366.39] = $130.63

1999, to October 15, 2002. Claimant was paid total disability in the amount of $289.93 per week from October 31, 1999, to November 24, 2001; Claimant was paid an additional lump sum in the amount of $5,000.00. Thus, Claimant received overcompensation in the amount of $3,336.95.[27]

In addition, as Claimant is currently employed with a loss of wage earning capacity, permanent partial disability compensation in the amount of $213.73 per week remains due to Claimant beginning on October 16, 2002, to the present and continuing.

Finally, as noted, *supra*, Respondents failure to file a Notice of Controversion upon the termination of benefits on November 24, 2001, results in a ten percent penalty assessment, based on the compensation owed from November 26, 2001 to September 26, 2002.

During this period, Claimant should have received permanent partial disability payments in the amount of $213.73 per week. Between November 26, 2001, and September 26, 2002, there are 43 3/7 weeks, thus Claimant should have received $9,282.00 during this period. Respondents paid only $5,000.00. There is a compensation difference during the relevant time period of $4,282.00. Thus, the ten percent penalty amount is $428.20, or ten percent of that difference.

ORDER

It is hereby ORDERED that:

1. Claimant was entitled to temporary total disability compensation from between September 28, 1998 to July 5, 1999, at the rate of $289.93 per week as a result of his right shoulder injury.

2. Claimant was entitled to permanent partial disability compensation from July 6, 1999, to October 15, 2002, at the rate of $213.73 per week for loss of wage-earning capacity as a result of his right shoulder injury.

3. Respondents are to pay Claimant permanent partial disability compensation from October 16, 2002 to the present and continuing at the rate $213.73 per week for the loss of wage-earning capacity as a result of his right shoulder injury.

[27][$31,312.44 + $5,000.00 = $36,312.44 paid] minus [$213.73 x 154 2/7 weeks = $32,975.49] = $3,336.95

4. In accordance with § 14(e) of the Act, a ten percent penalty assessment is levied against Respondents, payable to Claimant, for failure to timely file a Notice of Controversion when voluntary disability benefits were terminated on November 24, 2001, in the amount of $428.20.

5. Respondents are entitled to a credit for overpayments of compensation previously made to Claimant as a result of this injury in the amount of $3,467.58.

6. All computations are subject to verification by the District Director.

7. Employer is responsible for medical treatment in accordance with Section 7 of the Act.

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Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/LLT